

**ASSEMBLY BILL**

**No. 1666**

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**Introduced by Assembly Member Swanson**

January 20, 2010

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An act to amend Section 12945.2 of the Government Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 1666, as introduced, Swanson. California Family Rights Act: sick leave.

Existing law, the California Family Rights Act, permits employees of specified employers with more than 12 months of service with the employer and who have at least 1,250 hours of service with the employer during the previous 12-month period of employment to take up to a total of 12 workweeks in any 12-month period for family care and medical leave. Existing law defines “family care and medical leave” to mean leave for the birth or adoption of a child, the serious health condition of a child, parent, or spouse, or the serious health condition of the employee.

This bill would expand the definition of “serious health condition” to include an illness contracted by the employee that has been declared a national or state emergency pandemic.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

*The people of the State of California do enact as follows:*

1     SECTION 1. Section 12945.2 of the Government Code is  
2     amended to read:

12945.2. (a) Except as provided in subdivision (b), ~~it shall be~~  
is an unlawful employment practice for any employer, as defined  
in paragraph (2) of subdivision (c), to refuse to grant a request by  
any employee with more than 12 months of service with the  
employer, and who has at least 1,250 hours of service with the  
employer during the previous 12-month period, to take up to a  
total of 12 workweeks in any 12-month period for family care and  
medical leave. Family care and medical leave requested pursuant  
to this subdivision shall not be deemed to have been granted unless  
the employer provides the employee, upon granting the leave  
request, a guarantee of employment in the same or a comparable  
position upon the termination of the leave. The commission shall  
adopt a regulation specifying the elements of a reasonable request.

(b) Notwithstanding subdivision (a), ~~it shall not be~~ *is not* an  
unlawful employment practice for an employer to refuse to grant  
~~a an employee's~~ request for family care and medical leave ~~by an~~  
~~employee~~ if the employer employs ~~less~~ *fewer* than 50 employees  
within 75 miles of the worksite where ~~that~~ *the* employee *making*  
*the request* is employed.

(c) For purposes of this section:

(1) "Child" means a biological, adopted, or foster child, a  
stepchild, a legal ward, or a child of a person standing in loco  
parentis who is either of the following:

(A) Under 18 years of age.

(B) An adult dependent child.

(2) "Employer" means either of the following:

(A) ~~Any~~ A person who directly employs 50 or more persons to  
perform services for a wage or salary.

(B) The state, and any political or civil subdivision of the state  
and cities.

(3) "*Employment in the same or a comparable position*" means  
*employment in a position that has the same or similar duties and*  
*pay that can be performed at the same or similar geographic*  
*location as the position held prior to the leave.*

~~(3)~~

(4) "Family care and medical leave" means any of the following:

(A) Leave for reason of the birth of a child of the employee, the  
placement of a child with an employee in connection with the  
adoption or foster care of the child by the employee, or the serious  
health condition of a child of the employee.

1 (B) Leave to care for a parent or a spouse who has a serious  
2 health condition.

3 (C) Leave because of an employee's own serious health  
4 condition that makes the employee unable to perform the functions  
5 of the position of that employee, except for leave taken for  
6 disability on account of pregnancy, childbirth, or related medical  
7 conditions.

8 ~~(4) "Employment in the same or a comparable position" means~~  
9 ~~employment in a position that has the same or similar duties and~~  
10 ~~pay that can be performed at the same or similar geographic~~  
11 ~~location as the position held prior to the leave.~~

12 (5) "FMLA" means the federal Family and Medical Leave Act  
13 of 1993 (P.L. 103-3).

14 (6) "Health care provider" means any of the following:

15 (A) An individual holding either a physician's and surgeon's  
16 certificate issued pursuant to Article 4 (commencing with Section  
17 2080) of Chapter 5 of Division 2 of the Business and Professions  
18 Code, an osteopathic physician's and surgeon's certificate issued  
19 pursuant to Article 4.5 (commencing with Section 2099.5) of  
20 Chapter 5 of Division 2 of the Business and Professions Code, or  
21 an individual duly licensed as a physician, surgeon, or osteopathic  
22 physician or surgeon in another state or jurisdiction, who directly  
23 treats or supervises the treatment of the serious health condition.

24 (B) Any other person determined by the United States Secretary  
25 of Labor to be capable of providing health care services under the  
26 FMLA.

27 (7) "Parent" means a biological, foster, or adoptive parent, a  
28 stepparent, a legal guardian, or other person who stood in loco  
29 parentis to the employee when the employee was a child.

30 (8) "Serious health condition" means an illness, injury,  
31 impairment, or physical or mental condition that involves ~~either~~  
32 *any of the following:*

33 (A) Inpatient care in a hospital, hospice, or residential health  
34 care facility.

35 (B) Continuing treatment or continuing supervision by a health  
36 care provider.

37 *(C) For an employee taking leave pursuant to subdivision (a),*  
38 *an illness contracted by the employee that has been declared a*  
39 *national or state emergency pandemic by the President of the*  
40 *United States or by the Governor.*

1 (d) An employer ~~shall not be~~ *is not* required to pay an employee  
2 for any leave taken pursuant to subdivision (a), except as required  
3 by subdivision (e).

4 (e) An employee taking a leave permitted by subdivision (a)  
5 may elect, or an employer may require the employee, to substitute,  
6 for leave allowed under subdivision (a), any of the employee's  
7 accrued vacation leave or other accrued time off during this period  
8 or any other paid or unpaid time off negotiated with the employer.  
9 If an employee takes a leave because of the employee's own serious  
10 health condition, the employee may also elect, or the employer  
11 may also require the employee, to substitute accrued sick leave  
12 during the period of the leave. However, an employee shall not  
13 use sick leave during a period of leave in connection with the birth,  
14 adoption, or foster care of a child, or to care for a child, parent, or  
15 spouse with a serious health condition, unless mutually agreed to  
16 by the employer and the employee.

17 (f) (1) During any period that an eligible employee takes leave  
18 pursuant to subdivision (a) or takes leave that qualifies as leave  
19 taken under the FMLA, the employer shall maintain and pay for  
20 coverage under a "group health plan," as defined in Section  
21 5000(b)(1) of the Internal Revenue Code of 1986, for the duration  
22 of the leave, not to exceed 12 workweeks in a 12-month period,  
23 commencing on the date leave taken under the FMLA commences,  
24 at the level and under the conditions coverage would have been  
25 provided if the employee had continued in employment  
26 continuously for the duration of the leave. ~~Nothing in the preceding~~  
27 ~~sentence shall preclude~~ *this subdivision precludes* an employer  
28 from maintaining and paying for coverage under a "group health  
29 plan" beyond 12 workweeks. An employer may recover the  
30 premium that the employer paid as required by this subdivision  
31 for maintaining coverage for the employee under the group health  
32 plan if both of the following conditions occur:

33 (A) The employee fails to return from leave after the period of  
34 leave to which the employee is entitled has expired.

35 (B) The employee's failure to return from leave is for a reason  
36 other than the continuation, recurrence, or onset of a serious health  
37 condition that entitles the employee to leave under subdivision (a)  
38 or other circumstances beyond the control of the employee.

39 (2) (A) Any employee taking leave pursuant to subdivision (a)  
40 shall continue to be entitled to participate in employee health plans

for any period during which coverage is not provided by the employer under paragraph (1), employee benefit plans, including life, short-term, or long-term disability or accident insurance, pension and retirement plans, and supplemental unemployment benefit plans to the same extent and under the same conditions as apply to an unpaid leave taken for any purpose other than those described in subdivision (a). In the absence of these conditions an employee shall continue to be entitled to participate in these plans and, in the case of health and welfare employee benefit plans, including life, short-term, or long-term disability or accident insurance, or other similar plans, the employer may, at his or her discretion, require the employee to pay premiums, at the group rate, during the period of leave not covered by any accrued vacation leave, or other accrued time off, or any other paid or unpaid time off negotiated with the employer, as a condition of continued coverage during the leave period. However, the nonpayment of premiums by an employee shall not constitute a break in service, for purposes of longevity, seniority under any collective bargaining agreement, or any employee benefit plan.

(B) For purposes of pension and retirement plans, an employer ~~shall not be~~ *is not* required to make plan payments for an employee during ~~the a~~ leave period, and ~~the a~~ leave period ~~shall is not be~~ required to be counted for purposes of time accrued under the plan. However, an employee covered by a pension plan may continue to make contributions in accordance with the terms of the plan during the period of the leave.

(g) During a family care and medical leave period, the employee shall retain employee status with the employer, and the leave shall not constitute a break in service, for purposes of longevity, seniority under any collective bargaining agreement, or any employee benefit plan. An employee returning from leave shall return with no less seniority than the employee had when the leave commenced, for purposes of layoff, recall, promotion, job assignment, and seniority-related benefits such as vacation.

(h) If the employee's need for a leave pursuant to this section is foreseeable, the employee shall provide the employer with reasonable advance notice of the need for the leave.

(i) If the employee's need for leave pursuant to this section is foreseeable due to a planned medical treatment or supervision, the employee shall make a reasonable effort to schedule the treatment

1 or supervision to avoid disruption to the operations of the employer,  
2 subject to the approval of the health care provider of the individual  
3 requiring the treatment or supervision.

4 (j) (1) An employer may require that an employee's request  
5 for leave to care for a child, a spouse, or a parent who has a serious  
6 health condition be supported by a certification issued by the health  
7 care provider of the individual requiring care. That certification  
8 shall be sufficient if it includes all of the following:

9 (A) The date on which the serious health condition commenced.

10 (B) The probable duration of the condition.

11 (C) An estimate of the amount of time that the health care  
12 provider believes the employee needs to care for the individual  
13 requiring the care.

14 (D) A statement that the serious health condition warrants the  
15 participation of a family member to provide care during a period  
16 of the treatment or supervision of the individual requiring care.

17 (2) Upon expiration of the time estimated by the health care  
18 provider in subparagraph (C) of paragraph (1), the employer may  
19 require the employee to obtain recertification, in accordance with  
20 the procedure provided in paragraph (1), if additional leave is  
21 required.

22 (k) (1) An employer may require that an employee's request  
23 for leave because of the employee's own serious health condition  
24 be supported by a certification issued by his or her health care  
25 provider. That certification shall be sufficient if it includes all of  
26 the following:

27 (A) The date on which the serious health condition commenced.

28 (B) The probable duration of the condition.

29 (C) A statement that, due to the serious health condition, the  
30 employee is unable to perform the function of his or her position.

31 (2) The employer may require that the employee obtain  
32 subsequent recertification regarding the employee's serious health  
33 condition on a reasonable basis, in accordance with the procedure  
34 provided in paragraph (1), if additional leave is required.

35 (3) (A) In any case in which the employer has reason to doubt  
36 the validity of the certification provided pursuant to this section,  
37 the employer may require, at the employer's expense, that the  
38 employee obtain the opinion of a second health care provider,  
39 designated or approved by the employer, concerning any  
40 information certified under paragraph (1).

1 (B) The health care provider designated or approved under  
2 subparagraph (A) shall not be employed on a regular basis by the  
3 employer.

4 (C) In any case in which the second opinion described in  
5 subparagraph (A) differs from the opinion in the original  
6 certification, the employer may require, at the employer's expense,  
7 that the employee obtain the opinion of a third health care provider,  
8 designated or approved jointly by the employer and the employee,  
9 concerning the information certified under paragraph (1).

10 (D) The opinion of the third health care provider concerning  
11 the information certified under paragraph (1) shall be considered  
12 to be final and shall be binding on the employer and the employee.

13 (4) As a condition of an employee's return from leave taken  
14 because of the employee's own serious health condition, the  
15 employer may have a uniformly applied practice or policy that  
16 requires the employee to obtain certification from his or her health  
17 care provider that the employee is able to resume work. Nothing  
18 in this paragraph ~~shall supersede~~ *supersedes* a valid collective  
19 bargaining agreement that governs the return to work of that  
20 employee.

21 ~~(l) It shall be~~ *is* an unlawful employment practice for an  
22 employer to refuse to hire, or to discharge, fine, suspend, expel,  
23 or discriminate against, any individual because of any of the  
24 following:

25 (1) An individual's exercise of the right to family care and  
26 medical leave provided by subdivision (a).

27 (2) An individual's giving information or testimony as to his or  
28 her own family care and medical leave, or another person's family  
29 care and medical leave, in any inquiry or proceeding related to  
30 rights guaranteed under this section.

31 (m) This section shall not be construed to require any changes  
32 in existing collective bargaining agreements during the life of the  
33 contract, or until January 1, 1993, whichever occurs first.

34 (n) The amendments made to this section by ~~the act adding this~~  
35 ~~subdivision~~ *Chapter 827 of the Statutes of 1993* shall not be  
36 construed to require any changes in existing collective bargaining  
37 agreements during the life of the contract, or until February 5,  
38 1994, whichever occurs first.

39 ~~(o) The provisions of this~~ *This* section shall be construed as  
40 separate and distinct from ~~those of~~ Section 12945.

1 (p) Leave provided for pursuant to this section may be taken in  
2 one or more periods. The 12-month period during which 12  
3 workweeks of leave may be taken under this section shall run  
4 concurrently with the 12-month period under the FMLA, and shall  
5 commence the date leave taken under the FMLA commences.

6 (q) In any case in which both parents entitled to leave under  
7 subdivision (a) are employed by the same employer, the employer  
8 ~~shall not be~~ is required to grant leave in connection with the birth,  
9 adoption, or foster care of a child that would allow the parents  
10 family care and medical leave totaling more than the amount  
11 specified in subdivision (a).

12 (r) (1) Notwithstanding subdivision (a), an employer may refuse  
13 to reinstate an employee returning from leave to the same or a  
14 comparable position if all of the following apply:

15 (A) The employee is a salaried employee who is among the  
16 highest paid 10 percent of the employer's employees who are  
17 employed within 75 miles of the worksite at which that employee  
18 is employed.

19 (B) The refusal is necessary to prevent substantial and grievous  
20 economic injury to the operations of the employer.

21 (C) The employer notifies the employee of the intent to refuse  
22 reinstatement at the time the employer determines the refusal is  
23 necessary under subparagraph (B).

24 (2) In any case in which the leave has already commenced, the  
25 employer shall give the employee a reasonable opportunity to  
26 return to work following the notice prescribed by subparagraph  
27 (C).

28 (s) Leave taken by an employee pursuant to this section shall  
29 run concurrently with leave taken pursuant to the FMLA, except  
30 for any leave taken under the FMLA for disability on account of  
31 pregnancy, childbirth, or related medical conditions. The aggregate  
32 amount of leave taken under this section or the FMLA, or both,  
33 except for leave taken for disability on account of pregnancy,  
34 childbirth, or related medical conditions, shall not exceed 12  
35 workweeks in a 12-month period. An employee is entitled to take,  
36 in addition to the leave provided for under this section and the  
37 FMLA, the leave provided for in Section 12945, if the employee  
38 is otherwise qualified for that leave.

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